SUBJECT INDEX

PAGE

Argument 2

I.

The questions presented are so substantial and so vital to the air transportation industry as to require full consideration by this court 2

A. The questions presented are not frivolous 4

B. The questions presented are not wanting in substance and need further argument 5

II.

This court's dismissal of an appeal in a prior case does not bar a decision on the merits in this case 6

Conclusion 7

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Louisville & Nashville R.R. Co. v. Melton, 218 U. S. 36, 30 S. Ct. 676, 54 L. Ed. 921	4
Milheim v. Moffat Tunnel Improvement District, 262 U. S. 710, 43 S. Ct. 694, 67 L. Ed. 1194	5
Northwest Air Lines, Inc. v. State of Minnesota, 322 U. S. 292	6
Western Air Lines, Inc. v. Public Utilities Commission of the State of California, 342 U. S. 908	1, 6

RULES

Revised Rules of the United States Supreme Court, Rule 16, par. 3	1

IN THE

Supreme Court of the United States

October Term, 1954.
No. 316.

WESTERN AIR LINES INC.,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Under authority of Rule 16, paragraph 3, of the Revised Rules of the Supreme Court of the United States appellant, Western Air Lines, Inc., respectfully presents this brief in opposition to the motion to dismiss or affirm.

Applicant opposes the motion on these grounds:

1. The questions presented are substantial and require plenary consideration, with briefs on the merits and oral argument, for their resolution.

2. This Court may consider the case on its merits, notwithstanding dismissal of the appeal of Western Air Lines in *Western Air Lines, Inc. v. Public Utilities Commission of the State of California*, 342 U. S. 908 (1952).

ARGUMENT.

I.

The Questions Presented Are so Substantial and so Vital to the Air Transportation Industry as to Require Full Consideration by This Court.

Appellee's motion attempts to pass off as trifling the serious questions raised by appellant. The questions presented are not trivial. They strike at the heart of the national air transportations system established and developed by the Federal Government at great expense, for if economic control of Federally certificated air carriers be arrogated by the States, as it will if the decision below be allowed to stand, Federal control over the purse-strings of commercial aviation—compensation for carrying the United States mail—will be usurped.

To support the charge that the questions presented are so unsubstantial and devoid of merit as not to warrant full consideration by this Court, appellee must indulge and has indulged in an assumed analogy between air transportation and surface-bound transportation. Thus, on page 8 of the motion, appellee declares the law to be that interstate air carriers are subject to local regulation until the Congress preempts the field and that Congress has not so acted. On the contrary,

1. There is no decision of this Court establishing that air carrier operations are subject to State regulation;

2. There is no decision of this Court defining the extent to which the Congress has preempted the field of economic regulation of air carriers; and

3. There is no decision of this Court holding that the Congress did not intend, or that the Congress failed, to clothe the Civil Aeronautics Board with complete and exclusive regulatory power over all operations of *interstate* air carriers.

The proposed legislation referred to by appellee was designed to clarify the power of the Civil Aeronautics Board to regulate air lines operating wholly within the borders of a single State. The rejection of such legislation is not material to the issues of this case.

This case questions the extent to which, if at all, States may regulate the economic affairs of interstate air carriers. Until the decision of the Supreme Court of the State of California in this case, no written opinion has been handed down by any court stating the limits or dual capacity of Federal and State control over air line operations by interstate air carriers.

The requirement that the domestic air transportation industry of the United States know to what extent it must yield to State economic control and to what extent it may ignore attempted control by the Civil Aeronautics Board is of transcendant importance.

The numerous decisions of this Court touching on State functions in regulating surface-bound carriers are not controlling here. Other than the fact that air carriers and surface carriers transport persons and property from one point to another for pay, there is no historic or real relationship or resemblance between air carriers and surface-bound carriers.

A. The Questions Presented Are Not Frivolous.

This appeal is not frivolous, as charged by appellee. It is an earnest and sincere effort to get this Court for the first time to construe the Commerce Clause and the Civil Aeronautics Act in relation to State power to regulate interstate air carriers.

In *Louisville & Nashville R. R. Co. v. Melton,* 218 U. S. 36, 30 S. Ct. 676, 54 L. Ed. 921 (1910), Mr. Justice White made these statements:

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issues here presented; . . ." (p. 49).

Likewise, in *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, 43 S. Ct. 694, 67 L. Ed. 1194 (1923), Mr. Justice Sanford declared:

> "The Federal question presented, being one which requires analysis and exposition for its decision, is not frivolous . . ." (pp. 716-717).

B. The Questions Presented Are Not Wanting in Substance and Need Further Argument.

The question on which a decision is sought, is by no means free from debate.

On the question of to what extent the Congress has occupied the field of regulation, the dissenting Justices below made these observations:

> ". . . this defendant must use exclusively—whether in interstate or intrastate commerce—airplanes which are subject to federal regulation in respect to certification, maintenance, and operation; the airways over which they fly are federally equipped and operated; the number of passengers which any given plane may carry under varying conditions, its gross load, and the rates the defendant will receive for mail (if it has a mail contract) are all subject to exclusive federal control; likewise the defendant's crewmen must be federally certified; regulations covering the hours they may work, their qualifications and the minimums of procedures for maintenance of proficiency, are all to be found in the federal Civil Air Regulations." (Appendix A to Statement as to Jurisdiction, p. 44.)

As pointed out at page 13 of appellant's Statement as to Jurisdiction, Federal control over the practices and operations of air carriers coming within the Civil Aeronautics Act is extensive and all embracing. The Congress left nothing unregulated.

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Mr. Justice Jackson, has summed up the difference between surface-bound and air transport under the Commerce Clause in this fashion:

> "Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water." (Concurring opinion in *Northwest Air Lines, Inc. v. State of Minnesota*, 322 U. S. 292, at 303 (1944).)

The persuasive effect of the decision of the California Supreme Court on the courts of sister States makes it imperative that this Court now resolve the questions presented. The national air line industry is entitled to an affirmative decision, by the highest Court in the land, whether its economic affairs are subject to regulation only by the Civil Aeronautics Board or whether it must yield to local as well as Federal control.

II.

This Court's Dismissal of an Appeal in a Prior Case Does Not Bar a Decision on the Merits in This Case.

It is urged by appellee that this Court's dismissal of an appeal by Western Air Lines in a related but different case (*Western Air Lines, Inc. v. Public Utilities Commission of the State of California*, 342 U. S. 908), without opinion and on a divided vote, bars consideration of this appeal.

Res judicata and estoppel by judgment, when applicable, rest on policy reasons dictated by a desire to have a well regulated system of jurisprudence and to provide an end to litigation. Where application of the barrier would be

inequitable, there is no rule of law requiring that the Court refrain from considering the matter on its merits.

The dismissal without opinion by this Court of the other case was at the threshold of the appeal without the opportunity of fully presenting the case on brief and through oral argument. The appeal was from a decision of the Supreme Court of the State of California made in the form of an order also without opinion.

In this case the California Supreme Court, not deterred by the pleas of *res judicata* and estoppel, publicly voiced its opinion and resolved the Federal questions presented. It would be a harsh rule indeed if appellant were not now permitted to challenge that opinion, reduced as it has been from conjecture to material form.

The questions raised on the former appeal and the questions presented on this appeal are not identical. The questions presented here are directed solely at the validity of State regulation of the intrastate operations of *interstate* air carriers.

Conclusion.

The motion to dismiss or affirm should be denied and probable jurisdiction noted.

Los Angeles, California, October 8, 1954.

Respectfully submitted,

HUGH W. DARLING,
DONALD K. HALL,
Counsel for Appellant.

D. P. RENDA, and
GUTHRIE, DARLING & SHATTUCK,
Of Counsel.

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